No. 89-1279

In The

Supreme Court of the United States

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG, ALMA M. CALHOUN, and EDDIE HARGROVE,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF AMICUS CURIAE OF THE ATTORNEY GENERALS OF ALABAMA, CALIFORNIA AND TEXAS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The Attorney Generals of Alabama, California and Texas, and the offices that serve them, are responsible for the public enforcement of laws protecting public health, safety and welfare. The Attorney Generals are also directly responsible for enforcement of the criminal law generally, and, as part of that responsibility, have a strong interest in the processes of criminal sentencing. More broadly, the Attorney Generals maintain a strong interest in preserving the appropriate balance of regulatory authority between the States and the federal government in our system of federalism.

As this brief will demonstrate, this case strongly implicates each of these interests.

STATEMENT

This case involves a federal constitutional challenge to Alabama's traditional common law rules governing punitive damages for intentional fraud. In the judgment of *amici,* elemental principles of federalism and judicial restraint dictate that the States – and not this Court – should decide how and when punitive damages may be assessed in civil cases between private litigants. Federalizing the law of punitive damages risks undermining important state policy objectives and could throw the constitutionality of many state criminal sentencing statutes into doubt.

The present case does not raise any of the issues that have led some to question the wisdom and fairness of

punitive damages. This is not a case in which a defendant was assessed multiple punitive awards for a single wrongful act. Nor is this a case in which the punitive award was staggering or wholly out of proportion to the compensatory award. This case involves typical, garden-variety fraud of the kind that has given rise to punitive damages in this country for centuries. It is precisely the kind of case in which punitive damages function well, and uncontroversially, to vindicate state policy objectives through private enforcement and deterrence of serious harmful conduct.

ARGUMENT

I. PUNITIVE DAMAGES ADVANCE IMPORTANT POLICY OBJECTIVES IN A REASONABLE WAY, AND THUS SATISFY DUE PROCESS.

Amici recognize that the Due Process Clause, in both its substantive and procedural aspects, applies to state standards and procedures for assessing punitive damages, and to punitive awards made pursuant to these standards and procedures. However, in the judgment of *amici*, this Court's due process jurisprudence dictates that the standard of review for both substantive due process issues and procedural due process issues should be extremely deferential.

1. Substantive Due Process Review. Because punitive damages are at bottom a form of state economic and public welfare regulation, substantive due process scrutiny of state vicarious liability rules and of the potential

excessiveness of individual punitive awards should be governed by the deferential "rational basis" standard of review applicable to state regulations that do not infringe fundamental rights. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

In assessing the rational basis for punitive damages, this Court should give full consideration to the important role punitive damages play in advancing state policy objectives. Far from being a mere windfall to successful private litigants, punitive damages are an important adjunct to *amici*'s efforts to enforce laws protecting consumers, the environment, and the public health and welfare in general.

First, the availability of punitive damages encourages private litigants to vindicate their rights in court. Particularly in cases such as the present one where out-of-pocket losses are slight and noneconomic losses are uncertain, the availability of punitive awards provides a meaningful spur for private citizens to redress injuries done to them. Indeed, this Court recognized in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), that one important function of punitive, treble damages under the antitrust laws is to encourage private enforcement.

Second, punitive awards serve law enforcement purposes by providing an effective deterrent to conduct which might otherwise be profitable. The vast majority of States have – after substantial legislative deliberation in recent years – decided to retain punitive damages as an important component of a comprehensive strategy for maximizing adherence to consumer, environmental, and

public health and safety laws. Indeed, many state statutes – like their federal counterparts – provide for punitive damages or civil fines in the event of violation.

Thus, by encouraging private enforcement and deterring unlawful conduct, punitive damages provide a needed supplement to the States' public enforcement of consumer, environmental, and health and safety regulation. The availability of punitive damages is especially important in the present context because insurance fraud is involved. Insurance is both critical to the personal security of every citizen and the source of frequent fraud, bad faith refusals to pay claims, and other iniquities.

2. Procedural Due Process Review. State procedural mechanisms for determining punitive damages should also receive deferential scrutiny. The common law approach to punitive damages at issue in this case is not materially different from the approach that has been traditionally used by States for assessing punitive awards. This Court should give great deference to that historical experience, as the Court typically does when assessing the constitutionality of traditional forms of civil adjudication. *See Burnham v. Superior Court of California*, 110 S.Ct. ___, 58 U.S.L.W. 4629 (1990).

* * *

Finally, *amici* urge this Court not to place any firm constitutional cap on punitive awards, or to require States to adopt a particular multiple of compensatory damages as a limit on punitive awards – either as a matter of substantive or procedural due process. The calculation of what amount is appropriate to deter a defendant and

others similarly situated from repeating particular harmful conduct generally cannot be reduced to a mathematical formula. Any reasonable calculation of deterrence must take into account the probable gain from the harmful conduct generally (and not only in the particular case), the likelihood that the conduct will be detected, and the difficulty of meeting applicable burdens of proof even if the conduct is detected. Thus, even if compensatory damages are not great in an individual case, a substantial punitive award may be necessary to achieve a State's deterrent objective. Imposing a constitutional requirement that punitive damages be a particular multiple of compensatory damages would risk thwarting effective deterrence.[1]

II. PRINCIPLES OF FEDERALISM AND JUDICIAL RESTRAINT DICTATE THAT THIS COURT LEAVE THE ISSUE OF "REFORMING" PUNITIVE DAMAGES TO STATE LEGISLATURES AND COURTS.

This Court has repeatedly made clear that, under the Due Process Clause, States must be granted wide latitude to remedy

> what are found to be injurious practices in their internal commercial and business affairs. . . . [T]he due process clause is [not] to be so

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[1] In any event, the punitive award in this case appears to be approximately 4 to 5 times the compensatory award to respondent Cleopatra Haslip, when both her out-of-pocket loss and her claim for emotional distress are included as compensatory damages. Such a ratio presumably falls well within any hypothetical limit this Court might set.

> broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 107 (1978) (quotation omitted); *accord Lincoln Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-537 (1949). This principle has often been applied in cases involving due process challenges to the *procedures* through which States seek to vindicate public goals. *See Chandler v. Florida*, 449 U.S. 560 (1981); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96.

As Justice O'Connor has persuasively noted, "state innovation is no judicial myth." *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring). Unemployment insurance, minimum wage laws for women and children, and women's suffrage all originated in the States. *Id.* at 789. Similarly, "[a]fter decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation." *Id.* To promote the development of such sound public policies, this Court has recognized the need to leave breathing space for experimentation.

Indeed, this Court's due process jurisprudence has come to adopt the admonition of Justice Brandeis's dissent from a due process ruling restricting state economic regulation in *New State Ice Co. v. Liebmann*:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles.

285 U.S. 262, 311 (1932). *See Chandler v. Florida*, 449 U.S. at 107.

In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court vindicated these fundamental principles of federalism and judicial restraint when it declined to address constitutional arguments for "reform" of state punitive damages law. The Court observed that such review

> would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the . . . State legislature might choose to enact legislation addressing punitive awards for bad-faith refusal to pay insurance claims; failing that, the . . . state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent non-federal ground.

Id. at 79-80 (footnote omitted). The same bedrock principles apply with particular force here.

The imposition of punitive damages for insurance fraud is nothing more than a common law method of regulating economic conduct injurious to the public health and welfare. It is in precisely the area of economic

regulation that this Court has stressed the need to leave States with maximum latitude to "experiment with economic problems," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and to promote the public health and safety generally. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). Because no fundamental constitutional right such as First Amendment rights to free expression or free exercise of religion is generally implicated, state punitive damages law generally falls within the wide ambit of economic regulation to which this Court accords maximum deference.[2]

Constitutionalizing the law of punitive damages would, furthermore, thwart an active re-examination presently underway in the States. The majority of States have recently put in place a broad array of measures for guiding and limiting the assessment of punitive damages.[3] Alabama, Texas and seven other States have

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[2] *Amici* recognize that a different calculus of interests prevails when fundamental First Amendment rights are at stake, and that the scope of state authority to authorize punitive damages may be correspondingly confined. *E.G., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[3] *See* Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo. Rev. Stat. §§ 13-21-102, 12-25-127 (Supp. 1986); Conn. Gen. Stat. § 54-240(b) (Supp. 1989); Fla. Stat. Ann. §§ 768.72 through .74 (West Supp. 1989); Ga. Code Ann. § 51.12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20

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legislated caps on punitive awards in at least some kinds of cases.[4] Borrowing from the prevailing model for sentencing in capital punishment cases, several States have bifurcated the liability and damages phases of trials in which punitive damages are at issue.[5] Other States have specified additional standards for guiding the determination or review of punitive awards.[6] Some States have followed Alabama's common law rule and excluded evidence of a defendant's net worth from jury consideration.

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(West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537.675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

[4] See Ala. Code § 6-11-21 (Supp. 1988); Colo. Code § 13-21-102(1)(a) (Supp. 1986); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 1989); Ga. Code Ann. § 51-12.5.1(g); Kan. Civ. Proc. Code Ann. § 60-3701(e) (Vernon Supp. 1989); Nev. Rev. Stat. Ann. § 42.005.1 (Supp. 1989); Okla Stat. Ann. tit. 23 § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1990); Va. Code Ann. § 8.01-38.1 (Supp. 1989).

[5] *E.g.*, Ga. Code Ann. § 51-12.5.1(d)(2) (Supp. 1989).

[6] Fla. Stat. Ann. §§ 768.73-768.74 (West Supp. 1989); Kan. Civ. Proc. Code Ann. § 60-3701 (Vernon Supp. 1989); Ky. Rev. Stat. § 411.186 (1988); Minn. Stat. Ann. § 549.20 (West 1988); Mont. Code Ann. § 27-1-221 (1987); N.J. Stat. Ann. § 2A:58C-5 (West 1987); Or. Rev. Stat. § 30.925 (1987).

Several States have increased the burden of proof plaintiffs must meet in order to obtain punitive awards.

The variety and scope of these state measures make several points clear. First, the extent to which traditional methods for assessing punitive damages should be reformed is not a question readily amenable to judicial resolution. To the extent punitive damages are perceived as being in need of reform, there is no consensus as to what shape those reforms should take. Different States are trying different approaches, which embody varying values and policies. Important empirical questions as to whether, and to what extent, punitive liability has increased are at the heart of this policymaking enterprise. Reforms also require difficult policy tradeoffs between deterring consumer harm and promoting a favorable climate for attracting and developing business.[7] These are questions that should be left to the elected representatives of the People in their respective States.

Second, it is far from clear that the principal "reform" the petitioner in this case seeks – more specific standards to guide jury assessment of punitive awards – is generally perceived as a necessary, or even a sensible, constraint on punitive damages. Most state legislatures have considered and passed some type of punitive damages reform measure, but very few have opted for greater specificity in jury instructions or appellate review standards. Even

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[7] A State's decision to impose an upper limit on punitive awards may have little to do with any perceived risks posed by punitive damages generally, but it does reflect a desire to create a more favorable business climate and thereby gain an advantage over other States in attracting new businesses.

in those States elaborating on the traditional common law standards for assessing punitive awards, the criteria identified do not provide any greater specificity than that achieved by the common law in Alabama after *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). That extensive scrutiny in state legislatures and courts has not resulted in reforms of the type the petitioner seeks is a powerful indication that the traditional common law standards for assessing punitive damages are neither unfair to defendants nor a cause of escalating punitive awards.

Third, constitutionalizing punitive damages in the way petitioner urges would represent a substantial intrusion on state sovereignty. Petitioner and its supporting *amici* contend that even judicial common law articulation of standards more definite than those of the common law is inadequate because due process requires *legislative* revision of the common law methods for assessing punitive damages. This is little short of an affront to state sovereignty. So long as a State's process for deciding punitive damages is not fundamentally unfair, the Due Process Clause is satisfied. Nothing in the constitutional text or history, or this Court's interpretations of it, even remotely supports the idea that a State may not rely on common law development of standards for determining punitive damages.

III. ACCEPTANCE OF PETITIONER'S PROPOSED EXPANSION OF DUE PROCESS WOULD EFFECTIVELY TURN THIS COURT AS WELL AS LOWER FEDERAL AND STATE COURTS, INTO ONGOING REGULATORS OF THE SUFFICIENCY OF STATE PROCEDURES FOR ASSESSING PUNITIVE DAMAGES.

As this Court is well aware, the effort to constitutionalize the rules governing capital sentencing has produced less than satisfactory results. The due process arguments advanced by petitioner here are strikingly similar to those that led to this Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia* 428 U.S. 153 (1976). Indeed, the petitioner in this case explicitly relies on those decisions to support its proposed expansion of due process requirements. *See* Petition for Certiorari at 21, 28; Brief of Petitioner at 16, 33, 44. Accordingly, there is every reason to expect that resourceful counsel will bring to the courts an endless progression of due process challenges to punitive damages standards.

Acceptance of the expanded due process principles urged by the petitioner will thus invariably enmesh this Court – as well as state courts and lower federal courts – in an ongoing series of judgments about whether particular substantive standards for assessing punitive awards are sufficiently concrete to pass constitutional muster,[8]

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[8] Compare, in the capital punishment context, *Walton v. Arizona*, 110 S. Ct. ___, 1990 WL 85286 (1990) (vagueness challenge to Arizona statutory factor); *Clemons v. Mississippi*, 494 U.S. ___ (1990) (vagueness challenge to Mississippi statutory

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whether punitive awards can stand when one factor on which a jury relied is subsequently invalidated on appeal,[9] whether proportionality review is required,[10] and a host of other challenges analogous to those that have been brought in the capital punishment context. Indeed, it is far from inconceivable that restrictions on juror discretion in assessing punitive damages will be challenged as violating due process because they *exclude* relevant information from the decisionmaker.[11]

Amici respectfully urge this Court to pretermit this problem at the outset by refusing petitioner's invitation to constitutionalize the law of punitive damages.

IV. IF ACCEPTED BY THIS COURT, THE PETITIONER'S DUE PROCESS ARGUMENTS WOULD JEOPARDIZE THE CONSTITUTIONALITY OF CRIMINAL SENTENCING SCHEMES.

If the Due Process Clause is extended in the way urged by the petitioner in this case, the constitutionality of state criminal sentencing procedures will be thrown into doubt.

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factor); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (vagueness challenge to Oklahoma statutory factor; *Godfrey v. Georgia*, 446 U.S. 420 (1980) (vagueness challenge to Georgia statutory factor).

[9] Compare *Zant v. Stephens*, 463 U.S. 862 (1983).

[10] Compare *Pulley v. Harris*, 465 U.S. 37 (1984).

[11] Compare *Lockett v. Ohio*, 438 U.S. 586 (1978).

This Court has made clear that the States generally are "free to decide in sentencing how much discretion should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978). Even in capital cases, members of this Court have repeatedly recognized that sentencing does not involve the same type of decisionmaking as does deciding whether a defendant has violated a substantive criminal provision:

> In returning [a] verdict [on guilt or innocence], the jury decides whether the defendant committed a specific set of defined acts with a particular mental state. . . . The decision by a . . . death jury in the final stage of its deliberations is significantly different from the model just described. A wide range of evidence is admissible on literally countless subjects. . . . In considering this evidence, the jury does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves.

Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). Similarly, a four-Justice plurality in *Barclay v. Florida* made clear that this Court's precedents "have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors." 463 U.S. 939, 950 (1983).

Federal and state courts have echoed these fundamental principles in uniformly rejecting due process challenges to the discretion afforded criminal sentencers. In *United States v. Wivell*, 893 F.2d 156, 160 (8th Cir. 1990), for example, the court held that "a defendant's due process

rights are unimpaired by the complete absence of sentencing guidelines." Other decisions have similarly rejected due process challenges to the unfettered discretion of judges to set criminal sentences. *See e.g., Rogers v. State*, 582 S.W.2d 7, 13-14 (Ark. 1979) (en banc); *Smith v. Follette*, 445 F.2d 955 (2d Cir. 1971); *United States v. Florence*, 741 F.2d 1066 (8th Cir, 1984); *United States v. Davis*, 801 F.2d 754 (5th Cir. 1986), *cert. denied*, 108 S. Ct. 2908 (1988); *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1970); *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980); *cf. Stevens v. Armatrout*, 787 F.2d 1282 (8th Cir. 1986) (upholding constitutionality of sentence of 200 years under statute providing for sentence of "any term of years").

Petitioner Pacific Mutual's due process arguments would cast these previously uncontroversial due process rulings into doubt, and threaten the constitutionality of the common practice of state criminal statutes of leaving wide discretion to fix appropriate sentences. At a minimum, the settled constitutionality of such statutes will be subjected to a vigorous due process assault by the criminal defense bar. In effect, Pacific Mutual's arguments would threaten to turn criminal sentencing into precisely the "mechanical parsing of statutory aggravating factors" that this Court decried in *Barclay*. Such a result would undermine effective law enforcement, and the important policies underlying individualized, discretionary sentencing that is traditional in criminal cases.

The risk of such a result sheds light on the radical quality of Pacific Mutual's proposed expansion of due process. It should be clear to this Court that Pacific Mutual's arguments have no foundation in a principled

understanding of the Due Process Clause, and should therefore be rejected.

CONCLUSION

For all the foregoing reasons, the decision of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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